INTERIOR BOARD OF INDIAN APPEALS

Christine Murphy v. Acting Sacramento Area Director, Bureau of Indian Affairs

19 IBIA 228 (02/20/1991)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

CHRISTINE MURPHY
v.
ACTING SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-123-A Decided February 20, 1991

Appeal from a decision declining to revoke a permit for a drainage ditch.

Affirmed.

1. Indians: Lands: Rights-of-Way--Indians: Leases and Permits: Cancellation or Revocation

In determining whether to revoke a permit for a drainage ditch, at the request of the Indian owner of a tract crossed by the ditch, the Bureau of Indian Affairs must consider, not only its trust obligation toward that landowner, but also its trust obligation toward other Indian landowners served by the ditch.

APPEARANCES: Art Bunce, Esq., Escondido, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Christine Murphy appeals from a May 22, 1990, decision of the Acting Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to revoke a permit for a drainage ditch across appellant's allotment on the Torres-Martinez Reservation. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant's allotment, No. TM-323, was made under the Act of August 25, 1950, 64 Stat. 470, 1/ and consists of a 40-acre parcel described as the

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1/ The act authorized the Secretary to enter into a contract with the Coachella Valley County Water District for the irrigation of restricted Indian lands on the Cabazon, Augustine, and Torres-Martinez Reservations. Section 5 of the act provided:

"The Secretary of the Interior is authorized and directed to prepare rolls of the Torres-Martinez, Augustine and Cabazon Bands of Mission Indians as of June 30, 1949, and to allot not to exceed forty acres of irrigable or potentially irrigable land on the reservations of the respective bands, if available, to all enrolled members who have not heretofore received allotments."

NW¼ NW¼, sec. 14, T. 7 S., R. 8 E., San Bernardino Base and Meridian, Riverside County, California. The allotment is bisected diagonally by a 100-foot wide drainage ditch constructed by the Coachella Valley County Water District (District) prior to allotment. Although the northeastern portion of appellant's allotment is accessible by road, the southwestern portion is cut off by the ditch and is presently inaccessible. Appellant has sought in this matter either to have access provided to the southwestern portion of her allotment or to have the permit for the drainage ditch revoked.

In 1937, the Coachella Valley Storm Water District (later merged with the Coachella Valley County Water District) applied to the Secretary of the Interior for rights-of-way over Indian lands for the purpose of constructing flood control works. Reports from local BIA personnel concerning the application indicated that the Indian lands were subject to damage from storm water runoff and that the value of the lands would probably be greatly increased by the project.

On October 14, 1937, the Assistant Secretary of the Interior granted permission for the District to begin work at its own risk, pending formal action to be taken after the consent of the allottees and the tribe had been obtained. 2/

On April 25, 1938, the members of the Torres-Martinez Band of Mission Indians voted to approve the flood control project. On April 28 and August 19, 1938, the tribal council signed easements covering tribal lands. Both documents were approved by the Superintendent, Mission Indian Agency. 3/ In addition, some but not all of the allottees signed documents consenting to the project.

By letter of March 25, 1940, the District submitted the consents it had been able to obtain and requested formal approval. On September 11, 1940, the Commissioner of Indian Affairs advised the Secretary: "In view of the record, it is recommended that the accompanying map be approved without damages [4/] as a revocable permit under the general supervisory authority over Indian affairs conferred upon the Secretary of the Interior

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2/ Much of the land on the reservation was already allotted in 1937. As noted above, further allotments, including appellant's, were made under the 1950 act. At the time the flood control works were constructed, the land now allotted to appellant was tribal land.

3/ The Aug. 19 document covers land in sec. 14, including the property now owned by appellant. Both documents state that the easements are conveyed to the District "in consideration of the construction of said works across tribal lands, and without further consideration." They also waive all claims and damages resulting from construction of the works, among other things.

4/ Concerning damages, the Commissioner stated: "In view of the benefits of the work, as set out in the papers and the fact that the District has no funds which can be used for the purpose, no damages had been appraised in this case."

by Section 463, Revised Statutes (25 U.S.C. 2)." 5/ A map included in the record is presumably the map to which this recommendation refers. It is dated June 5, 1939, and shows a 100-foot wide diagonal channel crossing sec. 14, including the parcel which later became appellant's allotment, as well as sec. 24. The Acting Assistant Secretary approved the permit on September 2- (?) (date partially illegible), 1940. Although the date of construction of the project is not shown in the record, it is apparent that the channel was in existence in 1954; it is referred to as one of "two existing open drains" in a letter dated September 20, 1954, from the Area Director to the Commissioner.

Apparently sometime during the 1940's, or earlier, the District constructed an irrigation system which brought Colorado River water to the Coachella Valley. The Act of August 25, 1950, supra, was enacted as part of an effort to extend the irrigation system to the Torres-Martinez, Cabazon and Augustine Reservations. The act provided that the United States would reimburse the District for the cost of construction of the system on Indian lands. Despite the reimbursement guaranty, the District was unwilling to construct the system; therefore, in 1958, the 1950 act was amended to authorize the Secretary to construct the system and to contract with the District to operate and maintain it. Act of August 28, 1958, 72 Stat. 968. Subsection 1(a)(2) contained the proviso:

> That such irrigation and distribution system and drainage works shall be constructed on the Torres-Martinez Indian Reservation only upon the request of the Indian owners of the lands to be irrigated thereby and a determination by the Secretary of the Interior that the construction of the irrigation distribution system and drainage works is economically feasible. [6/]

Subsection (1)(c) provided:

> The Secretary of the Interior is authorized to take, use, or convey to the Coachella Valley County Water District, or other governmental agency, such rights-of-way across trust or restricted Indian lands as in his discretion may be needed for the construction, care, operation, and maintenance of the irrigation distribution system and drainage works authorized by this section or

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5/ The Commissioner's recommendation that a revocable permit be granted was undoubtedly also made with the knowledge that there was no statutory authority for the granting of rights-of-way for this purpose. See 25 CFR 256.59 (1938), which stated: "There is no general law authorizing the granting of drainage rights of way over Indian lands except allotted lands in Oklahoma." In 1948, Congress authorized the granting of rights-of-way over Indian lands "for all purposes." Act of Feb. 5, 1948, 25 U.S.C. §§ 323-328 (1988).

6/ The Assistant Secretary of the Interior, recommending enactment of the legislation, explained that, while the Cabazon and Augustine Bands had formally endorsed the proposed legislation, the Torres-Martinez Band had stated that it would not do so until some disputes with the Department had been resolved. H.R. Rep. No. 2555, 85th Cong., 2d Sess. 6 (1958).

> the irrigation distribution system and drainage works now administered by the District, and for the construction or improvement of roads necessary to serve the Augustine, Cabazon, and Torres-Martinez Reservations. The Indian landowner shall be paid reasonable compensation for such rights-of-way. The rights-of-way needed for the drainage works now administered by the district shall be taken and conveyed to the district only after the district has paid to the Indian landowner reasonable compensation therefor. [7/]

A contract was executed by the Secretary of the Interior and the President of the District on October 14, 1958, in accordance with the statute. The contract attached a schedule of the lands to be irrigated, including the parcel which was later allotted to appellant. The contract, like the statute, contained a proviso applicable to the Torres-Martinez Reservation, requiring a request for construction from the landowners and a determination of economic feasibility by the Secretary. At least some of the Torres-Martinez lands are now irrigated, as indicated in a February 1990 appraisal of appellant's property.

The provisions of the 1950 act concerning allotment of the Torres-Martinez Reservation were implemented by regulations published on March 22, 1958, 23 FR 1921, 25 CFR Part 130 (1959). The regulations provided for priorities to be given to tribal members who had made improvements on tribal land or who could prove they had made a selection prior to August 25, 1950. The remaining members were to make their selections in accordance with a drawing of numbers. 8/

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7/ Concerning the provision contained in the last sentence, the Assistant Secretary of the Interior explained:

"Some of the drainage works for the distribution system that is now administered by the district have been constructed by the district on Indian lands without obtaining the necessary rights-of-way, and the bill authorizes the Secretary to take such rights-of-way and to convey them to the district after the district has paid the Indian owner reasonable compensation therefor. This authority will resolve a source of friction between the Indians and the district that has existed for some time."

H.R. Rep. No. 2555, supra, at 5-6. Apparently, although it is not entirely clear, the drainage works described by the Assistant Secretary did not include the ditch at issue in this appeal but referred only to canals for which no permission at all had been granted. A Sept. 20, 1954, Area Director's letter discussing the negotiations which eventually led to the 1958 legislation, stated: "In the past, the District has been unable to secure the consent of the Tribal Committee for the granting of rights of way for drainage canals and has arbitrarily constructed the necessary canals without authority." As noted above, tribal permission was granted for the ditch at issue here.

8/ An Aug. 23, 1958, BIA letter indicates that there were 121 tribal members eligible to receive allotments and 122 irrigable tracts on the reservation.

Appellant fell into the third category. Her allotment application was made for her by her mother because she was still a minor on the date of application. 9/ The "Request for Allotment Selection" signed by appellant's mother on September 20, 1958, included the following statement:

> It is my understanding that an allotment of the above described land will be subject to a road right of way not to exceed 60 feet in width located along the center lines and also along the exterior boundary of the section in which the allotment is located, as approved by the Area Director. It is also understood that the allotment is subject to rights of way for irrigation and drainage water pipe lines, ditches, and canals constructed under the authority of the United States or by the Coachella Valley County Water District of Riverside County, California, and approved by the Area Director.

A trust patent was issued to appellant on March 4, 1959.

On February 26, 1988, appellant wrote to the District requesting that it provide access to the southwestern portion of her allotment. Appellant stated further:

> I feel that all expenses incurred should be covered by the water district because the drain was solely constructed by your company.
>
> We have been interested in selling the property since 1983 and without exception all prospective buyers have rescinded because of the lack of access across the drain. Presently we have yet another person very interested in buying the property but wants some assurance of access across the drain.

The District's general manager responded on March 29, 1988, stating that the District would not object to appellant constructing a bridge across the drainage ditch, provided her construction plans were approved by the District, but that the District would not pay for the plans or for construction.

Appellant then wrote to the Superintendent, Southern California Agency, BIA, requesting that BIA either revoke the District's permit or install a culvert to provide access to the southwestern portion of her allotment. The Superintendent responded on November 8, 1988, stating that a bridge, rather than a culvert, would be necessary to provide access to the southwestern portion of the allotment, but that no funds were available to construct a bridge for her. He stated further:

> As to your request that the channel easement be cancelled, it would be necessary to receive a relinquishment from the District, or it must be appropriately established and documented that the easement has been abandoned by the District and that

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9/ Appellant reached the age of 21 on Dec. 19, 1958.

the easement is unnecessary and/or is not being utilized for the intent granted.

Appellant renewed her request for revocation, arguing that the District had only a revocable permit and not an easement. On November 27, 1989, the Superintendent formally denied appellant's request, reiterating the paragraph just quoted.

Appellant appealed to the Area Director who affirmed the Superintendent's decision i n a May 22, 1990, letter to appellant's attorney, stating in part:

> It is stated in the appeal that the existence of the channel renders the property virtually "unmarketable and useless" to the Appellant, however, you have provided no proof, i.e., are there cancelled sales agreements, has sale been proposed to the adjacent landowners, has the property been advertised for sale, what attempts have been made by Appellant to utilize the property, has the BIA been requested to advertise the property as available for agricultural lease?
>
> It is our belief that Appellant was aware of the existence of the channel at the time of her allotment selection. The revocable permit is reflected on BIA's Title Status Report, which inclusion denotes recording of the permit in BIA's Office of Record (BIA's title offices were established in the early 1960's).
>
> You apparently believe that Appellant's statement that she's been unable to secure a purchaser for the property is sufficient grounds for BIA's cancellation or revocation of the permit to the Coachella Valley District. Based on the circumstances surrounding the statutory authority for the allotment and the agreements made for construction and maintenance of irrigation and flood control channels in the area, we cannot conclude that your client's justification is compelling enough to warrant revocation, or to threaten revocation.

(Area Director's Decision at 3-4).

Appellant's appeal from this decision was received by the Board on July 2, 1990. Appellant filed a statement of reasons. No other briefs were filed.

Discussion and Conclusions

Appellant argues that, although BIA has discretion in determining whether to revoke a revocable permit, its discretion in this case is limited by its trust obligation toward appellant, which requires that BIA take some action either to secure access to the southwestern portion of appellant's allotment or to revoke the District's permit. Appellant states that

> [s]he only asks that the BIA take some action on her behalf which could lead to the issuance of a fee patent "free of all charge or

> incumbrance whatsoever," [10/] including free of this revocable permit. Such action could easily take the form of notifying the holder of the revocable permit that the BIA will hold a hearing at which the BIA would take into account the view of both [appellant] and the holder of the revocable permit as to the current use, usefulness, and burden of the irrigation ditch, the expense that would be involved in having the holder of the revocable permit provide either a bridge or a culvert to give access to the other half of the trust allotment as a condition of continuation of the revocable permit, the current market value of the trust allotment with and without such access, etc. With such information, the trustee could make an informed decision as to how to exercise its discretion, rather than simply dismissing [appellant's] contentions as insufficiently compelling to justify any action.

(Appellant's Statement of Reasons at 4). Appellant argues further that the revocable permit held by the District is not protected by the Fifth Amendment and that BIA has improperly favored the interests of the District over those of appellant.

Although appellant's arguments suggest that only the interests of appellant and the District are at issue in this matter, there are clearly other interests at stake. The segment of the drainage ditch which crosses appellant's allotment is only a small portion of the ditch traversing the Torres-Martinez Reservation. A revocation of the permit for the portion of the ditch on appellant's allotment would presumably render the remainder of the ditch useless.

A February 1990 appraisal of appellant's allotment indicates that the drainage ditch is still in use and is well maintained (Appraisal at 6). Appellant does not contend, and nothing in the record indicates, that the drainage system is no longer needed for the purpose for which it was constructed, i.e., protection of reservation land from damage caused by storm water run-off. Further, it appears from statements in the appraisal that the ditch may now comprise part of an irrigation system as well. The appraisal states that, while appellant's property is undeveloped, approximately 60 percent of the immediate area is under cultivation. 11/ Irrigation water is delivered through underground concrete pipes; the appraiser believed that drainage from the irrigated lands flows into the ditch (Appraisal at 5). Even if the ditch is not used for irrigation drainage,

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10/ See General Allotment Act, § 5, 25 U.S.C. § 348 (1988) ("[A]t the expiration of [the trust] period the United States will convey the [allotted land] to [the allottee], or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever"); Mission Indian Relief Act of Jan. 12, 1891, § 5, 26 Stat. 712.

11/ The appraisal states that "[it] is doubtful that [appellant's] property has ever been farmed" (Appraisal at 6). There is nothing in the record to show whether appellant has ever sought to have the property leased for agricultural purposes or otherwise put to use.

it still has a role in protecting reservation lands, more than half of which are apparently now under cultivation, from storm water damage.

[1] Accordingly, in determining whether to revoke the District's permit with respect to appellant's property, BIA must consider, not only its trust obligation to appellant, but also its trust obligation to the other Indian landowners whose property is served by the ditch. Considering the impact that revocation would be likely to have on these other properties, the Board cannot conclude that BIA breached its trust responsibility in declining to revoke the District's permit. If BIA has no trust obligation to revoke the permit under the circumstances present here, it follows that it also has no trust obligation to threaten revocation in order to induce the District to provide access to the southwestern portion of appellant's allotment.

It is beyond the scope of this appeal to consider what other steps BIA might take to assist appellant in obtaining access to the southwestern portion of her allotment. BIA has stated that it does not have funds to construct a bridge for her. It is possible that an appropriate solution might require consideration of the circumstances of other allotments which are bisected by the ditch. 12/ The Board holds only that BIA's trust responsibility does not require it to revoke the District's permit or threaten to revoke it.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 22, 1990, decision of the Acting Sacramento Area Director is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

12/ It appears from the maps included in the record that there are probably several other allotments which are bisected by the ditch. The maps were prepared in 1939 and show all the land crossed by the ditch as tribal land. All or nearly all of this land was allotted in 40-acre tracts under the 1950 act.